RECENT DECISIONS.

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ADMIRALTY—SALVAGE—RIGHTS OF CREW WHERE VESSELS HAVE SAME OWNERS.—A steamer, having lost her propeller, summoned by wireless a passing vessel which belonged to the same owners, and was towed into port. *Held,* this was a salvage service, for which the crew of the rescuing vessel were entitled to salvage compensation. *The Roanoke* (D. C. N. D. Cal. 1913) 209 Fed. 114.

A claim for salvage is predicated upon services rendered by one who, though perhaps morally bound, see *The Sappho* (1871) 8 Moore P. C. C. [N. S.] 66, is under no legal obligation to aid the vessel to which he has rendered assistance. Benedict, Admiralty, § 223. Thus the members of a crew which has not been discharged cannot earn salvage money by saving their own vessel, except possibly under the most extreme circumstances, such as have been the subject of judicial speculation rather than decision. *The John Perkins* (D. C. 1857) 13 Fed. Cas. No. 7,360, reversing 18 Fed. Cas. No. 10,252. By an extension of the duty owed by a crew to the owner, Dr. Lushington refused salvage to a crew who had saved another vessel chartered by their owner. *The Maria Jane* (1850) 14 Jur. 857. This case was later distinguished upon the basis of a custom of the African trade, upon which it was supposed to have been decided, and the rule was laid down that the seaman's contract ordinarily calls only for services upon his own vessel. *The Sappho, supra.* In the absence, therefore, of some special custom or contract enabling the owner or master to call upon the crew to render services upon a vessel other than that upon which they have shipped, the common ownership of the vessels will not defeat a claim for salvage, *Gilchrist Transportation Co.* v. *110,000 Bushels of Wheat* (D. C. 1903) 120 Fed. 432, although it may be taken into consideration in determining the award. See *The Colima* (D. C. 1878) 6 Fed. Cas. No. 2996; *The Agamemnon* (1883) 48 L. T. R. [N. S.] 880.

ADMIRALTY—TORTS—SURVIVAL OF ACTIONS.—The decedent filed a libel *in rem* for injuries sustained in a collision. In proceedings for limitation of liability subsequent to his death, *held,* the cause of action survived to his administratrix. *The Ticeline* (D. C. S. D. N. Y. 1913) 208 Fed. 670.

After much hesitation, see *The Towanda* (C. C. 1877) 24 Fed. Cas. No. 14, 109; *The Sea Gull* (C. C. 1867) Chase Dec. 145; Tiffany, Death by Wrongful Act, §204, admiralty jurisprudence has followed the common law rule that an action for personal injuries abates at the death of the injured party, Benedict, Admiralty (4th ed.) §234, and has refused to give the estate an action for wrongful death. *The Harrisburg* (1886) 119 U. S. 199. Even where statutes give an action for damages to the estate, the enactments do not themselves give such a right against the ship as to enable the estate to maintain an action *in rem, The Vera Cruz* (1884) L. R. 10 App. Cas. 59; *The Corsair* (1892) 145 U. S. 335; but see *Holmes* v. *O. & C. Ry.* (D. C. 1880) 5 Fed. 75, in absence of a specific provision giving a lien. *The Ore-*

gon (D. C. 1891) 45 Fed. 62, 77. Admitting the contention in the principal case, that the injured party assumed the status of a claimant by virtue of the proceedings for limitation of liability, see Benedict, Admiralty (4th ed.) §296, the conclusion arrived at would, nevertheless, not seem to be justified. For, although the cases do intimate that death of a claimant shall not abate the suit *in rem* as between the libellant and the *res*, see *Penhallow* v. *Doane* (1793) 3 Dall. 54, 101; *The James A. Wright* (C. C. 1872) 10 Blatch. 160, no authority can be found supporting the survival, after his death, of the personal right of a claimant, any more than in the case of a libellant. Consequently, the substantial justice meted out in the principal case would not seem to have been attained on a logical basis.

ALIENS—DEPORTATION—FORMER DOMICILE WITHIN THE UNITED STATES.—The petitioner came to this country in 1898. She paid a temporary visit to Russia in 1908, and returned the same year. Upon her arrest for practicing prostitution in 1909, *held*, since the provisions of the Act of 1907, 34 Stat. ch. 1134, §§ 2 and 3, were not restricted to alien immigrants, she should be deported. *Lapina* v. *Williams* (U. S. Sup. Ct. 1914) N. Y. L. J., Feb. 19, 1914.

Although the term "alien immigrants" was used in only one section (§ 8) of the Immigration Statute of 1891, 26 Stat. 1084, ch. 551, this enactment was nevertheless held to apply only to persons who had never previously acquired a domicile in the United States. *In re Martorelli* (C. C. 1894) 63 Fed. 437. Even if Congress intended to give a broader scope to the subsequent acts of 1903 and of 1907, see *Taylor* v. *United States* (C. C. A. 1907) 152 Fed. 1, the language of these statutes does not clearly indicate such an intention; see *United States* v. *Nakashima* (C. C. A. 1908) 160 Fed. 842; consequently the interpretation given to the earlier statute should not have been varied. *In re Buchsbaum* (D. C. 1905) 141 Fed. 221, affirmed, *Rodgers* v. *United States ex rel. Buchsbaum* (C. C. A. 1907) 152 Fed. 346; but see *Taylor* v. *United States, supra*, reversed (1907) 207 U. S. 120; *Frick* v. *Lewis* (C. C. A. 1912) 195 Fed. 693. Owing to the uncertainties in the terms of the Act of 1907 providing for the deportation of aliens found practicing prostitution within three years after their arrival, which governed the decision in the principal case, the title of the statute, *viz:* "An Act to regulate the Immigration of Aliens," should control. See *Rodgers* v. *United States ex rel. Buchsbaum, supra.* However, the later amendment of 1910, 36 Stat. 263, ch. 128, § 3, providing that any alien who practices prostitution shall lose her domiciliary rights, indicates a clear intention of Congress to make a radical change in the former interpretation, and had the petitioner been brought to trial under this provision, the decision in the principal case would doubtless have been correct. Bouvé, Exclusion and Expulsion of Aliens, 439; see *United States* v. *Czeslicki* (D. C. 1913) 209 Fed. 496.

BAILMENTS—SAFE DEPOSIT COMPANIES—RELATION BETWEEN COMPANY AND DEPOSITOR.—An Illinois statute required all persons having "possession" or "control" of property of a decedent to give the State ten days' notice of a transfer to the personal representatives and to hold out the inheritance tax. *Held*, since a safe deposit company is a bailee for hire, it has "possession" of the contents of the safes. *National Safe Deposit Co.* v. *Stead* (1914) 34 Sup. Ct. Rep. 209, affirming 250 Ill. 584.

Under a similar law in New York, a safe deposit company allowed a depositor to remove securities after the death of his joint-rentor. *Held,* the relation being that of landlord and tenant, the company had no such "possession" of the securities as to be amenable to the statute. *People* v. *Mercantile Safe Deposit Co.* (N. Y. 1913) 159 App. Div. 98.

The question whether the relation between a safe deposit company and a box-renter results in a bailment or a tenancy, which is of little interest in suits for damages resulting from loss of property, inasmuch as the liability is in both cases the same, *Mayer* v. *Brensinger* (1899) 180 Ill. 110; see *Jones* v. *Morgan* (1882) 90 N. Y. 4, has lately become of prime importance in solving the question of possession for the purpose of the inheritance tax laws. Where the arrangement of locks requires the actual presence of the guard at the opening of the box, a constructive delivery and consequently a bailment is naturally inferred; but where the regulations merely require identification at the door, the relation of landlord and tenant seems more in accord with the facts. A somewhat similar distinction is perhaps indicated in the New York Banking Law (1909) §300, between a safe deposit company receiving goods "as bailee" and "letting out" vaults. In the interest of uniformity, however, it would seem wisest to hold the company as bailee for all purposes in spite of occasional difficulties, especially because the sole important result of the distinction is to impede the State in the collection of the inheritance tax.

CARRIERS—LIABILITY FOR PASSENGER'S BAGGAGE NOT ACCOMPANIED BY OWNER.—The plaintiff purchased a trip ticket and checked her trunk on it, but did not actually become a passenger at the time. The trunk was lost. *Held,* the railroad was liable as an insurer, irrespective of whether the passenger made, or intended to make, the journey. *Alabama Great Southern R. R.* v. *Knox* (Ala. 1913) 63 So. 538.

Since a ticket issued by a common carrier seldom defines the right which the company intends to give as regards baggage, the matter is open to construction in the light of usage. It is urged that a ticket vests two distinct rights, one to the transportation of the person and the other to that of baggage, and that the traveller may exercise either the one or the other or each independently. *McKibbin* v. *Wisconsin Central R. R.* (1907) 100 Minn. 270, approving 55 L. R. A. 650, 657. But, inasmuch as the exercise of the right of personal transportation customarily destroys the right to check baggage, it is plain that the latter is intended by the carrier to be incidental to the former. See *Southern R. R.* v. *Dinkins* (1913) 139 Ga. 332. Unless the passenger, therefore, gives the baggage to the carrier as an incident of his own journey, he violates at least the spirit of his contract; the court should, consequently, release the railroad from the onerous liability of a carrier of goods and consider it a mere gratuitous bailee. *Marshall* v. *Pontiac R. R.* (1901) 126 Mich. 45; see *Bradley* v. *C. & N. W. R. R.* (1909) 147 Ill. App. 397. Under modern systems of checking baggage, railroads no longer expect the traveller to watch his trunk at every transfer; *cf. Collins* v. *B. & M. R. R.* (Mass. 1852) 10 Cush. 506; but the logical result would seem to be, not the negation, but simply a broader interpretation of that essential inter-dependence of the journey of the passenger and the transportation of his baggage upon which the carrier's greater liability is founded.

CHATTEL MORTGAGES—FAILURE TO RECORD—DELIVERY OF POSSESSION.—A mortgagee took possession of goods under a chattel mortgage. Subsequently, the mortgagor executed a second mortgage, which was not recorded; the first mortgagee consented to retain possession for the benefit of the second mortgagee. *Held,* the second mortgage was invalid as to creditors. *Moffat* v. *Beeler* (Kan. 1914) 137 Pac. 963.

At common law, a chattel mortgage, to be good against creditors, could be made only by delivery of the property to the mortgagee, Jones, Chattel Mortgages (5th ed.) §176, although as between the parties themselves a change in possession was not necessary. See *Hall* v. *Snowhill* (1833) 14 N. J. L. 8. The recording acts merely provide a substitute for this common law requirement, see *Steele* v. *Benham* (1881) 84 N. Y. 634; *cf.* 1 Cobbey, Chattel Mortgages §494, and it would seem, require such a change of possession as would constitute a receipt and acceptance under the Statute of Frauds in case of a sale of personal property. Clearly, by recent interpretations of the Statute an actual delivery is necessary for this purpose. 13 Columbia Law Rev. 758. This essential, moreover, in the absence of any other overt act indicating the intention of the parties, should not be obviated by the fact that the chattel happens to be in the hands of a third party. In regard to chattel mortgages, however, the contrary has been held in an early case, *Nash* v. *Ely* (N. Y. 1838) 19 Wend. 523, but it is doubtful whether this is an authority in respect to the rights of creditors, since this question seems to have been avoided in the decision. It might also be urged that, since the recording acts were made primarily to protect anyone from extending credit because of the ostensible ownership in the mortgagor, the possession of any person other than the mortgagor should be a sufficient safeguard, especially since such a transaction is only *prima facie* fraudulent, in this country. However, the principal case can be sustained on the ground that creditors should be given every possible opportunity to share assets equally.

CONFLICT OF LAWS—DOMICILE—TEST OF INTENTION.—The testator was executor of his father's will in Louisiana, and as such was required to surrender his trust if he left the State permanently. Without complying with this requirement, he moved to Texas where he made a will, and died. In proceedings by the Texas executors to have the will registered in Louisiana, *held,* the testator died domiciled in Louisiana and the will must be tested by the laws of that State. *Burbank* v. *Ernst* (U. S. Sup. Ct. 1914). Not yet reported.

The testator became domiciled in New York in 1881, was appointed brigadier general in 1899, and from 1904 to 1908, and again from 1910 to 1912, had his headquarters on Governor's Island. He died in New York in 1912. In proceedings for assessment of the transfer tax by the State of New York, *held,* the proceedings should be dismissed, since the testator had been domiciled on Governor's Island, which is federal territory. *In re Grant's Estate* (Surr. Ct. N. Y. 1913) 144 N. Y. Supp. 567.

The defendant, who was domiciled in Oregon in 1911, in that year moved with his family to Idaho for the purpose of educating his children, but with the expressed intention of returning to Oregon, where his business and property were situated. In 1912 he voted in Idaho, although he was also registered in Oregon, and in November

of the same year he returned to Oregon. In an action for divorce, *held,* the defendant was domiciled in Oregon. *Miller* v. *Miller* (Ore. 1913) 136 Pac. 15.

These cases follow the general rule that man's domicile is determined by his intention, as expressed in the *factum* of his residence and his *animus manendi.* For a discussion of the principles involved see 10 Columbia Law Rev. 360; 12 Columbia Law Rev. 460, 461.

CONSTITUTIONAL LAW—FIFTEENTH AMENDMENT—GRANDFATHER CLAUSES. —The Constitution of Oklahoma prescribes certain educational requirements for all voters except those who have themselves voted, or whose ancestors voted, prior to January 1, 1866. *Held,* the provision does not violate the Fifteenth Amendment of the Federal Constitution. *Cofield* v. *Farrell* (Okla. 1913) 134 Pac. 407. See Notes, p. 336.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—INTOXICATING LIQUORS. —The defendant was indicted for bringing intoxicating liquors into local option territory in Delaware contrary to the Delaware Statute. On appeal from a verdict directed by stipulation, *held,* conviction may be sustained. *Grier* v. *State* (Del. 1913) 88 Atl. 579. See Notes, p. 330.

CONSTITUTIONAL LAW—SEARCHES AND SEIZURES—RETURN OF PROPERTY ILLEGALLY SEIZED.—In a prosecution for sending lottery tickets through the mails, certain incriminatory documents were seized without a warrant by a United States marshal from the possession of the defendant. Before trial, the court denied an application by the defendant for their return. The papers were admitted in evidence upon the trial. *Held,* a violation of the Fourth Amendment. *Weeks* v. *United States* (1914) U. S. Sup. Ct. Not yet reported. See Notes, p. 338.

CONSTITUTIONAL LAW—TAXATION—FOREIGN BUILT YACHTS NOT WITHIN THE UNITED STATES OWNED BY AMERICAN CITIZENS.—The United States sued to recover a tax under §37 of the Tariff Act, 36 U. S. Stat. L. 112, imposed upon the use of foreign built yachts owned by citizens of the United States. The owners of the yachts in question were residents of France, and the yachts themselves had acquired a *situs* abroad. Upon demurrer, *held,* the tax was constitutional. *United States* v. *Bennett* (Supreme Court, Oct. Term 1913) No. 629. Not yet reported.

An unbroken line of authority limits the taxing power of the State to persons or property within its territorial jurisdiction. *State Tax on Foreign Held Bonds* (1872) 15 Wall. 300, 319; *Union Transit Co.* v. *Kentucky* (1905) 199 U. S. 194, 204; see *Western Union Tel. Co.* v. *Kansas* (1910) 216 U. S. 1, 38. Since the power of taxation is exercised upon the assumption of an equivalent rendered to the tax payer in the protection of his person and property, and since the State can in no way afford this protection without its jurisdiction, the position taken as to the limits of state taxation is sound. It is, however, settled beyond question that the admiralty jurisdiction of a nation extends over vessels of that nation even when they are in navigable waters of other nations. Clark & Marshall (2nd ed.) Crimes 737. Besides providing for the punishment of offenses committed on such vessels, §272 of the Penal Code of March 4th, 1909, 35 U. S. Stat. L. 1142, Congress has also afforded compensation to these tax-payers, as for example, exempting them from the payment of "light money," see

The Conqueror (1897) 166 U. S. 110, and hence the principal case is correct in deciding that there was no constitutional limitation upon the federal taxing power prohibiting the taxing of property beyond the geographical boundary of the United States. It is submitted that the tax would be constitutional even if it applied to persons domiciled abroad; the case of *United States* v. *Bennett* (Sup. Ct. Oct. Term, 1913) No. 630, not yet reported, holds, however, that such persons were not intended to be included within the operation of the statute.

CONSTITUTIONAL LAW—VESTED RIGHTS—STARE DECISIS.—In an action by a corporation upon a contract made in the prosecution of business within a State which penalized the transaction of business by corporations within its confines unless certain statutory requirements were complied with, *held,* the corporation, having failed to comply with the statute, can maintain no action, and although in previous decisions the court reached a contrary conclusion, a proper recognition of the principle of *stare decisis* does not compel the adherence by a court to opinions formerly entertained by it under the circumstances of the principal case. *Oliver Co.* v. *Louisville Realty Co.* (Ky. 1913) 161 S. W. 370. See Notes, p. 334.

CORPORATIONS—DIRECTORS—IMPLIED CONTRACT FOR COMPENSATION.—The defendant corporation was organized under a statute requiring that a certain director be compensated for his services. The directors refused to vote him compensation. *Held,* he could recover upon an implied contract. *Apsey* v. *Chattel Loan Co.* (Mass. 1914) 103 N. E. 899.

It is laid down broadly that a director cannot recover for his services as such, in the absence of an express contract, *Cheeney* v. *L. B. & M. Ry.* (1873) 68 Ill. 570; *Home etc. Guano Co.* v. *Tillman* (1906) 125 Ga. 172, on the ground that the director is a fiduciary, and like the trustee, not entitled to compensation, or so seldom paid that the presumption is that his services are rendered gratuitously. See *National Loan etc. Co.* v. *Rockland Co.* (C. C. A. 1899) 94 Fed. 335, 337. But the real reason for the rule is doubtless public policy and the prevention of fraud. See *Butts* v. *Wood* (1867) 37 N. Y. 317, 319. An officer who is not a director, however, is allowed to recover in a proper case in some jurisdictions on an implied contract, *Smith* v. *Long Island R. R.* (1886) 102 N. Y. 190, and most jurisdictions soften the broad application of this presumption, and permit an officer who is a director to recover when the services rendered are clearly outside his regular duties as director. See *L. B. & M. Ry.* v. *Cheeney* (1877) 87 Ill. 446; *contra, Althouse* v. *Cobaugh Colliery Co.* (1910) 227 Pa. 580. If an implied contract cannot be raised to pay for his services, money subsequently voted to pay for them can, of course, be recovered by the corporation, *Hayes* v. *Canada etc. S. S. Co.* (C. C. A. 1910) 181 Fed. 289, or its creditors or stockholders. When, however, the corporate charter provides generally for compensation to officers, they may recover for their services although there is no express contract. *Rogers* v. *Hastings & D. Ry.* (1875) 22 Minn. 25; *Grundy* v. *Pine Hill Coal Co.* (Ky. 1885) 9 S. W. 414. The statutory provision in the principal case, therefore, undoubtedly justifies the conclusion reached by the court.

CORPORATIONS—SLANDER—JOINT LIABILITY WITH AGENT—EXEMPLARY DAMAGES.—An action for slander was brought against a corporation and its president jointly for defamatory words spoken by the latter in the course of his employment, but not expressly authorized. *Held,* they are jointly liable for exemplary damages. *Nunnamaker* v. *Smith's* (S. C. 1913) 80 S. E. 465.

Many jurisdictions hold a corporation liable for an agent's slander, as distinguished from libel, only when the act was expressly authorized, 11 Columbia Law Rev. 371, but the better view is that a corporation is responsible for defamation by its agents to the same extent as it is for their other torts. Burdick, Torts (3rd ed.) 139. Although the basis of liability of the master and the servant is different, *Mulchey* v. *M. R. Society* (1878) 115 Mass. 487, the majority of courts permit them to be sued jointly even though the former has not actively participated in the latter's wrongdoing. *Phelps* v. *Wait* (1864) 30 N. Y. 78. Federal courts permit joinder where the tort is one of negligence, *Charman* v. *L. E. & W. R. Co.* (C. C. 1900) 105 Fed. 449; *Riser* v. *Southern Ry.* (C. C. 1902) 116 Fed. 215, but seem to deny it when exemplary damages are sought. *Davenport* v. *Southern Ry.* (C. C. 1903) 124 Fed. 983. Since exemplary damages, whether regarded as punishment for the wrongdoer or compensation for aggravated misconduct, see 7 Columbia Law Rev. 122, are not awarded unless the tortfeasor has acted wilfully or wantonly, a principal who has not been guilty of any personal misconduct is in many jurisdictions held not liable for exemplary damages for the servant's wrongful act. *Cleghorn* v. *N. Y. C. & H. R. R.* (1874) 56 N. Y. 44; *L. S. & M. S. Ry.* v. *Prentice* (1892) 147 U. S. 101, 109; *contra, Boyer & Co.* v. *Coxen* (1901) 92 Md. 366. In many jurisdictions a corporation is subjected to such liability, *Memphis & C. P. Co.* v. *Nagel* (1895) 97 Ky. 9, where an individual principal is not. *Patterson* v. *Waldman* (Ky. 1898) 46 S. W. 17. There is evidently no distinction in principle to be made in these cases, 1 Sedgwick, Damages (9th ed.) 740, but it is to be observed that in most of the cases where it is made the defendants are public service corporations, owing additional duties to the public, see citations in 1 Sedgwick, Damages (9th ed.) 739, n. 229, and this fact seems to have had considerable influence. See *Goddard* v. *G. T. Ry.* (1869) 57 Me. 202, 212; *Peterson* v. *W. U. Tel. Co.* (1899) 75 Minn. 368.

COST—PROCHEIN AMI—GUARDIAN AD LITEM.—Upon a motion to modify a judgment granting costs against the *prochein ami* of the infant plaintiff, *held,* that in absence of statute to the contrary the *prochein ami* of an infant plaintiff is personally liable for costs. *Reynolds* v. *Great Northern Ry.* (1913) 206 Fed. 1003.

Undoubtedly the court has here enunciated the prevailing rule, which distinguishes in the matter of costs between infants, as plaintiff and as defendants. *Perryman* v. *Burgster* (Ala. 1837) 6 Port. 99; Schouler, Domestic Relations (5th ed.) 734, 738. The rule is said to be based on the fact that the "next friend" of a plaintiff is a volunteer while the guardian of a defendant is not. *Green* v. *Harrison* (Tenn. 1855) 3 Sneed 131. This, however, is not entirely true, as neither can be compelled to serve and both are almost invariably appointed upon application. No apparent difference exists between the function of a *prochein ami* and those of a guardian *ad litem.* Woerner, American Law of Guardianship, 64. Both are officers of the court, see *Collins* v.

Brook (1860) 5 H. & N. 700, *709, in the interest of the infant and may be removed at any time, the infant being at all times the ward of the court. *Tate* v. *Mott* (1887) 96 N. C. 19, 23. Both as a plaintiff and as a defendant the infant is held to be the party to the action rather than the *prochein ami, Sinclair* v. *Sinclair* (1845) 13 M. & W. *640, or guardian *ad litem, Bryant* v. *Livermore* (1874) 20 Minn. 313, 340. Consequently, under a statute declaring the losing party liable for the costs, the courts have held the infant plaintiff and not his "next friend" liable, *Crandall* v. *Slaid* (Mass. 1846) 11 Metc. 288; *Leavitt* v. *City of Bangor* (1856) 41 Me. 458, and in *Howett* v. *Alexander* (N. C. 1828) 1 Dev. L. 431, it is squarely held that the *prochein ami* is not liable for costs, while in *Smith* v. *Smith* (1891) 108 N. C. 365, the *prochein ami* of an incompetent is held liable only in case of mismanagement or bad faith. This rule seems best upon principle, as it is just as imperative to protect the infant's right to sue as to defend, by relieving his innocent representative of any personal liability.

CRIMINAL LAW—EX POST FACTO LEGISLATION—EVIDENCE.—A statute enacted between the time of the offense and the defendant's trial substituted the certified minutes of the official stenographer for a deposition taken by the magistrate in connection with the evidence of a deceased witness as the previous law required. Held, not *ex post facto. People* v. *Qualey* (N. Y. 1914) N. Y. L. J., Feb. 18, 1914.

Generally, an *ex post facto* law is defined as a law, retrospective in its application, which makes that criminal which was not such when the act was committed, or increases the punishment, or makes it harder for the accused to defend himself. McClain, Criminal Law, §78. But since no one has a vested right in technically correct procedure, see *Hopt* v. *Utah* (1884) 110 U. S. 574, a retroactive law affecting such a rule is not *ex post facto,* Cooley, Constitutional Limitations (7th ed.) 381, unless some substantive right is thereby impaired. See Wharton, Criminal Law (11th ed.) §43; *State* v. *Caldwell* (1898) 50 La. Ann. 666. A *dictum* in *Calder* v. *Bull* (1798) 3 Dall. 386, 390, which seems to suggest this distinction in regard to rules of evidence, is therefore sound. If the law simply enlarges the class of persons competent to testify, it is not *ex post facto. Hopt* v. *Utah, supra.* Although the act repealing a statute providing that no evidence obtained by means of a judicial proceeding shall be admissible has been held within the prohibition, *Frisby* v. *United States* (1912) 38 App. D. C. 22, the decision is not in harmony with the present tendency toward liberal construction of constitutional guarantees. Since the change in the principal case did not operate to alter the situation of the accused materially to his detriment it should be sustained.

CRIMINAL LAW—FALSE PRETENSES—VENUE.—The defendant wrote a letter from B containing false pretenses to a party in A, and induced him to mail a check to the defendant in B. *Held,* the offense of obtaining money under false pretenses was consummated in B, and the courts of B had jurisdiction. *State* v. *Smith* (Iowa 1913) 144 N. W. 32.

Sinc the crime of obtaining goods under false pretenses is not consummated until the goods have been acquired, the prosecution must be brought in the jurisdiction where the property was transferred, and not where the false pretenses were made. *Graham* v. *People* (1899) 181 Ill. 477, 493; *Regina* v. *Stanbury* (1862) 9 Cox C. C. 94. Now the

essential element in obtaining the goods appears to be the transfer of title, for the crime may be committed without the delivery of the goods where the victim is by false pretenses induced to pass title to goods already in the defendant's possession, *Commonwealth* v. *Schwartz* (1892) 92 Ky. 510; *contra, Watson* v. *People* (1888) 27 Ill. App. 493, and on the other hand, change of possession is not enough unless title is also parted with. *State* v. *Anderson* (1877) 47 Iowa 142; *Queen* v. *Kilham* (1870) L. R. 1 C. C. R. 261. Hence, when the victim delivers goods to a carrier in A consigned to the defendant in B, the majority of courts hold that the goods were obtained in A, since delivery to the carrier passed title to the defendant subject only to the victim's right of stoppage *in transitu. State* v. *Briggs* (1906) 74 Kans. 377; *Commonwealth* v. *Wood* (1886) 142 Mass. 459; *Norris* v. *State* (1874) 25 Oh. St. 217. This doctrine, although technically correct, reaches the curious result that even though the defrauded party should exercise his right of stoppage *in transitu* the defendant would still be liable for obtaining property which he possibly never saw, while, on the other hand, he would not be guilty if the contract of sale failed to pass title under the Statute of Frauds. See *Ex parte Parker* (1881) 11 Neb. 309. And it really seems that so long as the defrauded party retains control over the goods, such as the right of stoppage *in transitu,* the crime has not been committed although title has technically passed. See *Bates* v. *State* (1905) 124 Wis. 612. Consequently, a few states have adopted a more practical rule by holding that the word "obtain" means to get actual possession of, and not merely to procure title technically by delivery to a carrier. *Commonwealth* v. *Schmunk* (1904) 207 Pa. 544; *cf. Jamison* v. *State* (1881) 37 Ark. 445.

CRIMINAL LAW—SELF DEFENSE—EVIDENCE OF THREATS.—In a prosecution for homicide, where the defendant relied upon self-defense, *held,* recent uncommunicated threats made by the deceased against the defendant were admissible in evidence. *State* v. *Johnson* (Iowa 1913) 144 N. W. 303.

For a discussion of this subject, see 13 Columbia Law Rev. 167.

CRIMINAL LAW—UNACCEPTED PARDON—EFFECT ON CONSTITUTIONAL GUARANTY AGAINST SELF-INCRIMINATION.—The defendants refused to testify before the Grand Jury on the ground that their testimony would incriminate them under §§37 and 39 of the Penal Code. Later the President issued full pardons to them, which they refused to accept, persisting in their refusal to answer. Upon presentment of the Grand Jury for contempt, *held,* the defendants could no longer insist upon their privilege under the Fifth Amendment of the Federal Constitution. *United States* v. *Burdick* (D. C. S. D. N. Y. 1914) N. Y. L. J., Mar. 6, 1914. Not yet reported.

It is unquestioned that the President may issue a pardon at any time after the commission of a crime, either before or after the legal proceedings have been instituted for punishment. See *Ex parte Garland* (1866) 4 Wall. 333, 380; 2 Willoughby, Constitution, §§686, 687. A pardon, however, is regarded as a deed, to the validity of which not only delivery but also acceptance is necessary. *United States* v. *Wilson* (1833) 7 Pet. 150; see *In re De Puy* (D. C. 1869) 7 Fed. Cas. No. 3814; *Commonwealth* v. *Halloway* (1863) 44 Pa. 210. Since the effect of a pardon duly issued and accepted is to obviate the possibility of any legal punishment for the offense committed, and since, moreover,

the purpose of the Fifth Amendment of the Federal Constitution is to secure to every person the right not to be prosecuted on his own testimony, the object of the constitutional provision is fully accomplished if the person is afforded such immunity against such future prosecution, and therefore the witness should no longer be allowed to raise the privilege against self incrimination. *Brown* v. *Walker* (1896) 161 U. S. 591; 3 Wigmore, Evidence, §§2280, 2281. Although, logically, the defendants could insist on the correctness of their position, since a pardon can be cancelled any time before its acceptance, the progressive tendency to throw down the formal barriers of constitutional privileges, if the right is preserved in substance, justifies the decision. See *Ex parte Muncy* (Tex. 1913) 163 S. W. 29.

DESCENT AND DISTRIBUTION—DISQUALIFICATION OF HEIR—MURDER OF ANCESTOR.—In an action in partition the plaintiff claimed title through a husband who had inherited the property from his wife after murdering her. *Held,* in the absence of an express statutory prohibition the husband could inherit as the statutory heir. *Holloway* v. *McCormick* (Okla. 1913) 136 Pac. 1111.

For a discussion of this subject, see 11 Columbia Law Rev. 180.

EVIDENCE—CHARACTER EVIDENCE IN CIVIL ACTIONS.—In a suit for trespass, *held,* the defendant may not introduce evidence tending to show his general good character. *Gould* v. *Bebee* (La. 1913) 63 So. 848.

Although in criminal proceedings the right of the defendant to bring in evidence to prove his good character is well recognized, 4 Columbia Law Rev. 302, as regards civil actions the contrary is the general rule. *Vance* v. *Richardson* (1895) 110 Cal. 414; *Colburn* v. *Marble* (1907) 196 Mass. 376. Where, as in the principal case, the mental state of the party is an immaterial element in the action, character evidence would clearly be irrelevant to the issue, 4 Chamberlayne, Evidence, §3270, since character, in the law of evidence at least, is a psychological attribute which would be likely to bear only upon the mental and moral tendencies of the defendant. See 1 Wigmore, Evidence, 121; 4 Chamberlayne, Evidence, §3272. This conception of character evidence is presumably the logical basis for allowing the introduction of such testimony in criminal proceedings, in which the mental attitude of the prisoner is almost always an essential element of the offense. See *Davis* v. *State* (1851) 10 Ga. 101, 105; 4 Chamberlayne, Evidence, §3271. Although, following this line of reasoning, it is clearly inconsistent to exclude such evidence in those actions, as in fraud, where the mental attitude of the defendant is the gist of the offense, see *Werts* v. *Spearman* (1884) 22 S. C. 200, 219; *Ruan* v. *Perry* (N. Y. 1805) 3 Caines 120, overruled, *Gough* v. *St. John* (N. Y. 1837) 16 Wend. 646, nevertheless the great weight of authority excludes character evidence in all civil actions. *Dudley* v. *McCluer* (1877) 65 Mo. 241; *Gough* v. *St. John, supra.* It is only in criminal proceedings that the common law is so insistent upon giving the defendant the benefit of every possible defense. See *Wright* v. *McKee* (1864) 37 Vt. 161. In civil causes, on the other hand, the logical inconsistency of rejecting such testimony is considered outweighed by the elimination of the confusion of issues and of the delays, which would result from permitting its introduction. *Stow* v. *Converse* (1820) 3 Conn. 325, 345; *Wright v. McKee, supra.*

INJUNCTION—INDUCING BREACH OF CONTRACT.—The defendant published circulars alleged to be libelous which induced the plaintiff's customers to break their contracts with the plaintiff. *Held,* although the libelous statements could not be enjoined, the defendant would be restrained from inducing the plaintiff's customers to break their contracts with the plaintiff. *American Malting Co.* v. *Keitel* (C. C. A. 1913) 209 Fed. 351.

For a discussion of the basis of the refusal of equity to enjoin libels while issuing injunctions against other injurious publications, see 13 Columbia Law Rev. 732.

LANDLORD AND TENANT—TERMINATION OF LEASE—RETENTION OF RENT PAID IN ADVANCE.—A lease called for an advance payment of $20,000 to be applied to the rent of the third, fourth and fifth years. The landlord entered for condition broken within the first year. In a suit by the lessee's assignee, *held,* the landlord was entitled to keep the advance payment. *Galbraith* v. *Wood et al.* (Minn. 1914) 144 N. W. 945.

The courts have invariably held that whenever money is deposited as security for the payment of rent, a cancellation of the lease by the landlord for any cause which justifies the action, does not operate as a forfeiture from the tenant of the sum so deposited: the fact of its being security entitles the lessee to a return of the security less the amount of rent due and unpaid at the time of the termination. *Scott* v. *Montells* (1888) 109 N. Y. 1; *Michaels* v. *Fishel* (1902) 169 N. Y. 381. The same result, moreover, has been reached even in the face of a provision in the lease that the security shall be absolutely and wholly forfeited in case the tenancy should be terminated by the lessee's failure to perform the covenant. *Chaude* v. *Shepard* (1890) 122 N. Y. 397. Where, however, the rent is payable in advance, the eviction of the tenant before the expiration of the period in respect to which the rent was claimed does not divest the landlord of his right to retain the money so paid, *Hepp Co.* v. *Deahl* (1912) 53 Colo. 274; *Healy* v. *McManus* (N. Y. 1862) 23 How. Pr. 238; *McNulty* v. *Duffy* (1899) 59 N. Y. Supp. 592, or of his right to recover the money if it was not as yet paid. 1 Tiffany, Landlord and Tenant, 1179. This view is not universally accepted, *Sutton* v. *Goodman* (1907) 194 Mass. 389; *Hall* v. *Middleby* (1908) 197 Mass. 485; *Wreford* v. *Kenrick* (1895) 107 Mich. 389, but is entirely sound, since there is nothing inconsistent in the lessor's terminating the lease and at the same time insisting on the payment of rent absolutely due before the termination. It seems extremely difficult to regard the sum deposited in the principal case as rent, since under the terms of the lease it was to be applied only to the third, fourth and fifth years, and the lessee had paid his rent up to the time of the eviction, but the court felt constrained by the pleadings to consider it as "rent payable in advance."

LIMITATION OF ACTIONS—SEDUCTION—ABSENCE OF DEFENDANT FROM STATE.—In a prosecution for seduction under promise of marriage, *held,* that § 2176 of the New York Penal Law, which provides that the lapse of two years after the commission of this offense bars the prosecution, is qualified by § 143 of the New York Code of Criminal Procedure, which provides that no time during which the defendant is not an inhabitant of the State is part of the limitation. *People* v. *Buccolieri* (N. Y. Court of General Sessions, 1914) N. Y. L. J., Mar. 3, 1914.

This case raises a question concerning the Code of Criminal Procedure analogous to a somewhat disputed question concerning the Code of Civil Procedure. Despite the equivocal language in § 414 of the Code of Civil Procedure, the New York courts now hold that the general provisions concerning the limitation of actions which are laid down in Chapter 4 apply to all statutes of limitations and not merely to those contained in that chapter. 14 Columbia Law Review 173. By analogy, the principal case holds that § 143 of the Code of Criminal Procedure applies to all criminal statutes of limitations. In applying this doctrine to new statutory limitations, however, whether civil or criminal, it is often difficult to decide whether the new limitation is a mere statute of limitations to which the provisions for exemptions and extensions can apply, or whether it is so incorporated in the right as to become a part of it and to constitute a condition precedent to the maintenance of an action. *Cf. Hill* v. *Supervisors* (1890) 119 N. Y. 344; *Hamilton* v. *Royal Ins. Co.* (1898) 156 N. Y. 327. In some other States where this question has arisen, it has been held that provisions for the suspension of the statute during the defendant's absence do not apply to the special limitations to prosecution for seduction. *State* v. *Heller* (1890) 76 Wis. 517; *cf. People* v. *Clement* (1888) 72 Mich. 116. If we concede that statutes limiting criminal prosecutions are not analogous to those limiting civil actions and that they should always be strictly construed in favor of the defendant, Wharton, Criminal Pleading & Practice (8th ed.) § 316, there is some ground for these decisions, but the history of the statute, as shown in the principal case, seems to indicate that in New York, at least, the intention of the legislature in enacting § 2176 of the Penal Law was to establish a mere statute of limitations to which the general provisions in § 143 of the Code of Criminal Procedure should apply.

MECHANICS' LIENS—RIGHT OF ARCHITECT FOR PLANS AND SUPERINTENDENCE.—An action was brought to foreclose a lien filed by the plaintiff, an architect, for the value of his services in drawing plans for and superintending the construction of certain houses. *Held,* although an architect who only draws plans is not entitled to a mechanic's lien, yet, when he both furnishes the plans and superintends construction he is entitled to a lien for the value of both plans and superintendence. *Spannahke* v. *Mountain Construction Co.* (1913) 144 N. Y. Supp. 968.

It seems well settled that an architect who merely provides plans and specifications for a building has no lien for the value of his services, *Price* v. *Kirk* (1879) 90 Pa. 47; *Raeder* v. *Bensberg* (1879) 6 Mo. App. 445, except in certain States where architects are expressly mentioned among the persons entitled to a lien. See *Freeman* v. *Rinaker* (1900) 185 Ill. 172. But one who is employed not only to draw plans, but also to direct and oversee the erection of the building is, by a preponderance of authority, allowed a lien for the value of all services rendered, *Friedlander* v. *Taintor* (1905) 14 N. Dak. 393; see *Hughes* v. *Torgerson* (1891) 96 Ala. 346, thus not confining the right to acquire a lien to persons who may be supposed to need the especial protection of the statute. See *Stryker* v. *Cassidy* (1879) 76 N. Y. 50; *Phoenix Furniture Co.* v. *Put-in-Bay Hotel Co.* (C. C. 1895) 66 Fed. 683. This view is, however, disapproved in several States, on the ground that an architect is not properly a mechanic, and, therefore, not entitled to the benefits of the statute; see *Foushee* v. *Grigsby & Robinson* (Ky. 1876) 12

Bush. 75; or that, since the plans do not enter into the structure, the statute is inapplicable. *Cf. Ames* v. *Dyer* (1856) 41 Me. 397. On the other hand, at least one jurisdiction allows a lien to be filed for the value of services by way of superintendence, but refuses to extend it to the labor of drawing plans and specifications; *Mitchell* v. *Packard* (1897) 168 Mass. 467; and where the contract for the two is entire, withholds the lien completely. *Libbey* v. *Tidden* (1906) 192 Mass. 175. This conflict may, of course, be ascribed in great measure to the varied wordings of the statutes. The question at issue, however, is not so much one of interpretation as of policy; the fundamental problem is whether the application of the Mechanics' Lien Acts should be extended still further beyond the limits of that class of persons for whose protection they were originally passed, namely, the manual laborers who are dependent for their subsistence upon an immediate payment for their labor.

MORTGAGES—MARSHALING OF ASSETS.—N, after mortgaging his farm, sold it to M, who both assumed payment of the mortgage and gave N a second mortgage on a part of the farm. The remainder of the land, after several transfers subject to both mortgages, was conveyed to B, subject to but 36 per cent. of the first mortgage. Upon foreclosure of both mortgages, N sought to compel the satisfaction of the first mortgage as far as possible out of B's land. *Held,* he had this right. *Newby* v. *Fox* (Kan. 1913) 133 Pac. 890. See Notes, p. 332.

NEGLIGENCE—FUNCTIONS OF THE COURT AND JURY.—The plaintiff was injured at the defendant's crossing by a train which was running at 40 miles an hour. *Held,* the question of the defendant's negligence was properly left to the jury. *Tousley* v. *Pacific Elecric Ry.* (Cal. 1913) 137 Pac. 31. See Notes, p. 341.

PLEADING AND PRACTICE—CONTINUING OFFENSES—PROOF OF TIME AS AN ESSENTIAL ELEMENT.—Defendant was convicted of the crime of keeping a disorderly house. *Held,* since time is not an essential element of this offense, it is not necessary to prove commission within the time laid in the indictment. *State* v. *Dufour* (Minn. 1913) 143 N. W. 1126.

It is universally recognized that where time is not of the essence of an offense, a variance between the allegations and the proof as to the time when the crime was committed is not fatal. 22 Encyc. of Pleading & Practice 614. Moreover, it is generally conceded that time is usually not a material ingredient, except where the act done is unlawful only during certain seasons, on certain days, or at certain hours of the day. *State* v. *Land* (1873) 42 Ind. 311. It has been established by numerous decisions in Massachusetts, however, that wherever a series of acts amounting to a practice or occupation constitutes the offense, time is of the essence of the charge, which may not be sustained by proof varying from it in any degree in date. *Commonwealth* v. *Briggs* (Mass. 1846) 11 Metc. 573; see *Commonwealth* v. *Peretz* (1912) 212 Mass. 253. This peculiar doctrine, which appears to have originated in an *obiter dictum* in *Commonwealth* v. *Pray* (Mass. 1832) 13 Pick. 359, 1 Bishop, New Crim. Proc. (2nd ed.) § 402 and notes, although manifestly not founded on reason, has been followed in several jurisdictions. *State* v. *Small* (1888) 80 Me. 452; *Fleming* v. *State* (1889) 28 Tex. App. 234; see *Dansey* v. *State* (1887) 23 Fla. 316. On the other hand, an

overwhelming majority of the courts hold, with the principal case, that the keeping of a disorderly house and similar crimes of continuance are governed by the general principle, as time is not of the essence of the offense. *United States* v. *Kissel* (1910) 218 U. S. 601; *Howard* v. *People* (1900) 27 Colo. 396; see *United States* v. *Burch* (1801) 1 Cranch. C. C. 36.

PLEDGES—DELIVERY OF POSSESSION—OWNER'S RECEIPT FOR GOODS IN HIS BONDED WARE HOUSE.—A distiller in good faith delivered to a bank, as collateral security for a loan, a warehouse receipt for whisky owned by him and stored in the bonded warehouse on his premises. *Held,* there was a sufficient delivery of possession to constitute a pledge enforcible in subsequent bankruptcy proceedings against the distiller's trustee. *Taney* v. *Penn National Bank* (1914) 34 Sup. Ct. Rep. 288. See Notes, p. 339.

RECEIVERS—CONTRACTS—PERFORMANCE.—An action was brought by the receiver of a transportation company for the value of services rendered by him under a contract between the company and the defendant, which contract the receiver within a reasonable time elected to reject. *Held,* the defendant was entitled to set off damages growing out of non-performance of the contract against receiver's claim for services rendered by him. *Butterworth* v. *Degnon Const.* Co. (D. C. S. D. N. Y. 1913) 208 Fed. 381.

The rights of a receiver under executory contracts entered into by the persons over whose effects he has been appointed are generally analogous to those of an assignee. *Cf. Brassel* v. *Troxel* (1896) 68 Ill. App. 131; *Devlin* v. *The Mayor* (1875) 63 N. Y. 8. But since it would be inequitable to allow the receiver to get the full benefit of performance after the bankruptcy, and leave the solvent party with a probably worthless claim against the estate, should the receiver subsequently refuse to perform, the court compels the latter to assume the obligation of the contract if he elects to require performance by the solvent party thereto. High, Receivers (4th ed.) §273 (a). While it is settled, therefore, that an election by the receiver to adopt an executory contract by his insolvent operates as a novation, a receiver apparently may render services under the old contract in order to ascertain whether it is profitable for the estate, before deciding whether to adopt or reject it. Alderson, Receivers, § 270. However, a subsequent refusal to enter into a new contract with the solvent party precludes any recovery for services rendered by the receiver in contract. Since the receiver in the principal case never assumed the contract, the only possible theory of a recovery by him in his own right is quasi-contractual, for the benefits received by the solvent party. But inasmuch as the latter had a right to these services on a valid contract and as he made no other request for their performance, no element exists on which to base such a recovery. Keener, Quasi-Contracts, 341. On the other hand, in a suit on a contract between a receiver and another party, the latter should never be allowed to set off a claim against the bankrupt. *Singerly* v. *Fox* (1874) 75 Pa. 112. Thus, the principal case reached an absolutely equitable result by balancing one unsound recovery against another. See *Parsons* v. *Sovereign Bank* (1912) 107 L. T. R. 572; *Foster* v. *Nixon Nav. Co.* (1906) 23 T. L. R. 138. However, a possible explanation of the decision, is that the receiver was enforcing a quasi-contractual claim of the insolvent for

benefits conferred under the broken contract, in which case a set-off would be proper. Woodward, Quasi Contracts, § 178.

SALES—WARRANTY—ACCEPTANCE AS WAIVER.—In an action for the purchase price of a chattel, *held,* under the Sales Act, the acceptance of the goods by the vendee did not preclude his right to recover damages for breach of an implied warranty. *Nelson Co.* v. *Silver* (N. Y. App. Div. 1914.) Not yet reported.

The rule that acceptance of the goods by the buyer is a waiver of his right to recover damages for breach of an implied warranty, is the result of the struggle against the recognition of implied warranties in sales, and can be justified only by the assumption that such engagements are not true warranties but rather conditions, 1 Columbia Law Rev. 84-86; *Haase* v. *Nonnemacher* (1875) 21 Minn. 486, or on certain doubtful grounds of practicability. Burdick, Sales (3rd ed.) 158. On any other theory, it is incorrect, since a warranty is a promise, 16 Harvard Law Rev. 466, and therefore gives rise to a claim which cannot be waived or abandoned except by a release under seal or for a consideration. Anson, Contracts (8th ed.) 333 *et seq.* It is sometimes defended on the ground of estoppel, *Studer* v. *Bleistein* (1889) 115 N. Y. 316, but there can be no estoppel unless the seller was led to act to his injury by relying on the conduct of the buyer. See *Allison* v. *Vaughn* (1875) 40 Ia. 421. Moreover, even if a warranty could be waived, it would be unjust to lay down as a rule of law that acceptance of the goods is a waiver, *Cordage Co.* v. *Rice* (1896) 5 N. Dak. 432, for waiver depends on intent, which must be proved as a fact to the jury, and not inferred as a matter of law. 40 Cyc. 262. However, the rule is widely followed in this country, *Louis Eckles Co.* v. *Cornell Co.* (1912) 119 Md. 107; *Columbus Co.* v. *See* (1912) 169 Mich. 661, though it has been modified by various arbitrary exceptions. Williston, Sales, § 489. Thus, in New York, it has been held not to apply to express warranties, *Zabriskie* v. *C. V. R. R. Co.* (1892) 131 N. Y. 72, nor even to implied warranties unless the defect is easily discoverable, *Kelly Co.* v. *Barber Co.* (N. Y. 1909) 136 App. Div. 22, and the contract is executory. See *Cooper* v. *Payne* (N. Y. 1905) 103 App. Div. 118. The courts of England and of some of our States have wisely rejected the doctrine, Burdick, Sales (3rd ed.) 159; *Morse* v. *Moore* (1891) 83 Me. 473, as has the Uniform Sales Act, N. Y. Pers. Prop. Law, Art. 5, § 130; § 49 of Mass. Act, which, however, contains a modification required by business practice, requiring the buyer to notify the seller of the breach within a reasonable time. Williston, Sales § 484. With the exception of a *dictum* in *Lee* v. *Barrett* (N. Y. 1913) 144 N. Y. Supp. 941, the principal case seems to be the first New York case to recognize the change effected by the statute. *Cf. Rich* v. *Minolfi* (N. Y. 1913) 157 App. Div. 783; *Ferguson* v. *Netter* (1912) 204 N. Y. 505.

STATES—PRIORITY—SUBROGATION.—The plaintiff, surety for an insolvent bank, having paid the bank's debt to the State, sued its receiver for the amount. *Held,* the plaintiff was subrogated to the State's priority over private creditors. *U. S. Fidelity & Guaranty Co.* v. *Carnegie Trust Co.* (N. Y. App. Div. 1914) N. Y. L. J., Mar. 17, 1914.

For a discussion of the principles applicable to this case see 13 Columbia Law Rev. 757.

SURETYSHIP AND GUARANTY—CONTRIBUTION BETWEEN CO-SURETIES—RES ADJUDICATA.—In an action against the principal and sureties on three bonds given by an administrator, two sureties were discharged, the present plaintiff being the only one held liable. Having paid the entire amount, he sues his co-sureties for contribution. *Held,* he should recover. *Central Banking & Security Co.* v. *U. S. Fidelity & Guaranty Co.* (W. Va. 1913) 80 S. E. 121.

It is a well established principle that for a decision to have any binding effect as *res adjudicata* in a subsequent suit, the parties sought to be bound by it must have stood in an adversary relation in the previous action as to exactly the same issue. *Koelsch* v. *Mixer* (1894) 52 Oh. St. 207; see *McMahon* v. *Geiger* (1880) 73 Mo. 145. It seems clear that in the principal case the rights as between the sureties were not *res adjudicata,* since the previous suit was on an entirely different cause of action. This is evident from the essential difference between the nature of the creditor's contract right on the bond and the nature of the right of contribution between co-sureties, which is based simply on an equity that the common burden should be shared equally. *Warner* v. *Morrison* (Mass. 1862) 3 Allen 566; *Dering* v. *Winchelsea* (1787) 1 Cox. Eq. Cas. 318. It is a right which arises from the relation of co-sureties, *Wayland* v. *Tucker* (Va. 1848) 4 Gratt, 267, and ripens into a cause of action, of which the courts of law have jurisdiction, see 1 Brandt, Suretyship & Guaranty (3rd ed.) §279, upon the payment by any surety of more than his *pro rata* share. *Wood* v. *Leland* (Mass. 1840) 1 Metc. 387; *Camp* v. *Bostwick* (1870) 20 Oh. St. 337. The fact, moreover, that a surety who is no longer liable to the creditor may nevertheless be liable to his co-surety for contribution, *Boardman* v. *Paige* (1840) 11 N. H. 431; *cf. Wood* v. *Leland, supra,* makes it apparent that, although some courts enforce contribution upon principle of subrogation, see Pingrey, Suretyship (2nd ed.) §166; *Lidderdale's Ex'rs.* v. *Ex'r. of Robinson* (1827) 12 Wheat. 594, the right of the surety is not dependent on the existence of any right in the creditor against the same surety. *Cf. Camp* v. *Bostwick, supra,* but see *Hood* v. *Morgan* (1900) 47 W. Va. 817; *Cross* v. *Scarboro* (Tenn. 1873) 6 Baxt. 134. It follows, therefore, that a determination of a surety's non-liability to the creditor on the bond is not conclusive against his obligation of contribution.

TRESPASS—ENTRY BY DECEIT.—The defendant's inspector, after obtaining entrance to the plaintiff's apartment by pretense of a desire to read the electric meter, turned off the current, under an erroneous belief that the plaintiff had not paid his bills. *Held,* the inspector's act constituted a trespass for which the defendant is liable. *Olin* v. *United Electric Light & Power Co.* (1913) 143 N. Y. Supp. 1012.

It is a well settled rule at common law that every unauthorized entry on the land of another is a trespass, for which an action will lie. *Pfeiffer* v. *Grossman* (1853) 15 Ill. 53. On the other hand, it is equally well recognized that a license to enter is a justification of what would otherwise be a trespass. *Blake* v. *Dow* (1857) 18 Ill. 261; *Walter* v. *Post* (N. Y. 1857) 6 Duer 363. This holds true even where the license is granted by mistake, *Shaw* v. *Mussey* (1860) 48 Me. 247; see *Ashcraft* v. *Cox* (Ky. 1899) 50 S. W. 986, on the principle that one cannot complain of what another has done with his consent. Bishop, Contracts (2nd ed.) §1299. A license, however, is technically an au-

thority given to do some act, or a series of acts, on the land of another; see *Cook* v. *Stearns* (1814) 11 Mass. 533; therefore, where the defendant has exceeded the scope of the license, it will no longer serve as an adequate defense to an action of trespass. *Shiffer* v. *Broadhead* (1889) 126 Pa. 260; *Norton* v. *Craig* (1878) 68 Me. 275. In other words, the justification pleaded must be co-extensive with the trespasses committed. *Bartlett* v. *Prescott* (1860) 41 N. H. 493. Moreover, where the plaintiff was induced to grant the license by the fraud of the defendant, the license is thereby vitiated. Burdick, Torts (2nd ed.) 719; *Brown* v. *American T. & T. Co.* (1908) 82 S. C. 173. Therefore, from whatever viewpoint we regard it, the principal case appears to be sound and in accord with the authorities. *Cf. Kimball* v. *Custer* (1874) 73 Ill. 389.

TRUSTS — NEW YORK TRUSTS — DESTRUCTIBILITY. — The defendant claimed title to an estate held under a trust to pay over the income, created in 1904. The beneficiaries compromised with him, agreeing that a portion of the estate should be held in trust to pay the income to him for life. By an action against the trustee, this agreement was confirmed. Residuary beneficiaries, some of whom were born after the judgment, demand the performance of the original trust. *Held,* the compromise was valid as a proceeding to preserve the trust. *New York Life Ins. & Trust Co.* v. *Conkling* (App. Div. 1913) 144 N. Y. Supp. 638.

The interest of a beneficiary in any trust to receive and apply rents, created since 1903, see *Robinson* v. *N. Y. Life Ins. & Trust Co.* (N. Y. 1912) 75 Misc. 361, cannot be alienated. *Stringer* v. *Young* (1908) 191 N. Y. 157. It seems clear, therefore, that neither the compromise agreement nor the judgment confirming it can derive any validity from the participation of the *cestuis,* or any attempted surrender of their volition. It is plain, however, that the agreement, if made in good faith, was not an attempt to destroy the trust. *Cf. Cuthbert* v. *Chauvet* (1893) 136 N. Y. 326. If, moreover, it may be assumed in favor of the prior judgment, upon collateral attack, that, as the principal case declares, the performance of the agreement was held to be for the best interests of the estate, the prior judgment, although sued for upon an erroneous theory, may none the less be supported. For since the peculiar circumstances of the principal case seem to justify the application of Consol. Real Prop. Law §105, the only difficulty lies in construing a declaration of trust, for a consideration, as a sale within the meaning of that section. The principal case, however, chooses the more dubious ground of the inherent jurisdiction of equity to preserve trust estates. See *U. S. Trust Co.* v. *Roche* (1889) 116 N. Y. 120; but see *Wood* v. *Wood* (N. Y. 1836) 5 Paige 596. This view, however, must contend not only with the novelty of the method used by the trustee, but also with the analogy between his act and those acts which § 105 classifies as in contravention of the trust. In either view, the decision seems to diverge from the former tendency of the courts not to allow any variation of a testamentary trust by act of the interested parties, except in strict compliance with §105. *Lent* v. *Howard* (1882) 89 N. Y. 169; *cf. Woodbridge* v. *Bockes* (1902) 170 N. Y. 596.

VENDOR AND PURCHASER—BURDEN OF TAXES AND INSURANCE.—The plaintiff entered into possession of real estate under a contract of pur-

chase. Subsequently the vendor paid taxes and insured the property. In an action for specific performance, *held,* the vendor was entitled to reimbursement of the taxes but not of the insurance premiums. *Millville Aërie No. 1836, F. O. of Eagles* v. *Weatherby* (N. J. 1913) 88 Atl. 847.

One who pays the obligation of another, when the payment is not regarded in law as having been officiously made, is entitled to be reimbursed by the primary obligor, to the extent that in equity and good conscience the latter should have made the payment. See Keener, Quasi-Contracts, 388. Under a specifically enforcible contract for the sale of land, a payment of taxes by the vendor, *Mangold* v. *Isabella Furnace Co.* (1906) 31 Pa. Super. Ct. 275, while the vendee was in possession, *Bank* v. *Danforth* (1887) 80 Ga. 55, would be within the rule. *Braley* v. *Langley* (1882) 28 Kan. 804. Similarly, the vendor's act in insuring the premises can hardly be considered officious, and if he is considered a trustee of the legal title, see *Keep* v. *Miller* (1886) 42 N. J. Eq. 100, it seems he should be reimbursed for the premiums paid. *Cf. Stevens* v. *Melcher* (1897) 152 N. Y. 551, 576. The better view, however, would seem to be that, in general, the vendee is rather in the position of a mortgagor, 1 Columbia Law Rev. 369; *Braley* v. *Langley, supra,* upon whom there is no active duty to insure and therefore no liability for the cost of insurance effected by the mortgagee. *Dolson* v. *Land* (1850) 8 Hare 216; *Faure* v. *Winans* (N. Y. 1824) 1 Hopkins 283; *cf.* 10 Columbia Law Rev. 153. Accordingly, in the absence of a primary obligation to insure devolving upon the vendee, there could be no ground for the application of the equitable rule to create his liability to the vendor. So that whether the proceeds of the vendor's insurance are held by him for his own benefit as his loss may appear, as under the English rule, or are applied on the purchase price to the benefit of the vendee, as in the majority of the American jurisdictions, where the vendor's position more closely approximates that of a trustee, see 1 Columbia Law Rev. 311; *cf. Marion* v. *Wolcott* (1904) 68 N. J. Eq. 20, it would be ineffectual to relieve the act of the vendor in securing the insurance from being a voluntary act as regards the vendee.

WILLS—PERSONAL PROPERTY—LIFE ESTATE.—The testator devised the residue of his real and personal property to his wife for life, with no limitation over. *Held,* the wife took merely an estate for life in the personalty as well as in the realty. *Deats* v. *Ziegener* (N. J. 1913) 89 Atl. 31.

The rigor of the old common law rule of construction, by which a gift of personalty for life passed the absolute interest in the property, has been very generally relaxed, so as to yield to the intention of the testator. Page, Wills, §§ 596, 597. The presence of an executory limitation to take effect on the death of the first taker is a sufficient indication of the intention of the testator to limit the interest of the donee to a life estate. *Smith* v. *Bell.* (1832) 6 Pet. 68. In the absence of a bequest over, however, the testator's intent must be clearly shown in order to restrict the gift to that of a life estate; when this has been done by the express wording that the gift shall be for life only, the addition of the power to dispose of the property is held not to show any intention to increase the estate given. *Pratt* v. *Douglas* (1884) 38 N. J. Eq. 516; *Wooster* v. *Cooper* (1895) 53 N. J. Eq. 682;

contra, Diehl's Appeal (1860) 36 Pa. 120. The principal case, however, conceding the old rule that a gift expressly for life without an executory limitation does convey the absolute interest in personalty, *Derickson* v. *Garden* (1880) 5 Del. Ch. 323; *Brownfield's Estate* (Pa. 1839) 8 Watts 465, seizes upon the mingling of real and personal property in one bequest as an opportunity to fall in line with the general tendency to abolish the old distinction between realty and personalty, and inasmuch as the wife takes only a life estate in the real property, reasonably works out the intention of the testator to convey the same estate in the personalty rather than to give it to her absolutely.